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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 734

BERNARD M. WOLFE and FREDERICK J. DANNENFELSER, individuals and co-partners, doing business under the names and styles "Dutch Paint Co." and "Manning-Mitchell Paint Co.",

Petitioners,

vs.

NATIONAL LEAD COMPANY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATUTES

28 U. S. C. § 1254(1)

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief in Opposition.

Petitioners seek review of a final judgment of the United States Court of Appeals for the Ninth Circuit entered on November 27, 1959, affirming a judgment in respondent's favor for profits and damages arising out of petitioners' infringement of respondent's "Dutch Boy" trademark. In seeking such review petitioners invoke this Court's jurisdiction under 28 U. S. C. § 1254(1).

Petitioners also seek review of a judgment of the same Court entered on May 17, 1955, holding petitioners guilty of deliberate and willful trademark infringement and unfair competition, and in that connection they ask for a "reconsideration" by this Court of the denial of their petition for a writ of certiorari to review that earlier judgment (*Wolfe et al., doing business as Dutch Paint Co., etc.* v. *National Lead Co.*, No. 357, October Term, 1955, November 7, 1955, 350 U. S. 883).

Statement of the Case.

While the petition ostensibly seeks review of the later judgment of the Court of Appeals affirming the District Court's judgment on the accounting for profits and damages, it is evident that petitioners are primarily seeking a review of the earlier judgment of the Court of Appeals dealing with the substantive issues of this litigation.

The questions set out in the petition and the argument that follows assume facts which are not supported by the record. In addition, the petition neglects to state the salient facts as found by the Court of Appeals and established by the record. Accordingly, it becomes necessary for us to set forth these facts in order that the Court may have a proper perspective of the issues that have actually been determined in this litigation, which began in October, 1949.

Respondent is the owner of the registered trademark "Dutch Boy," which it has extensively used and advertised for various paints and paint products for more than forty years. The validity of this trademark is not questioned by petitioners and was expressly sustained by the Court of Appeals (223 F. 2d at 197-199).

The infringing marks are "Dutch," "Dutch Paint" and "Dutch Paint Co.," used by petitioners in the sale of paints and paint products.

Petitioners entered the paint business in 1946 under the name of "Manning-Mitchell, Inc." and "in the same year they acquired for some $9,000 a partnership concern known as 'Dutch Paint Co.' at San Francisco which operated a small paint factory and which had on hand some labels marked 'Dutch Paint'." (223 F. 2d at 198).[1]

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[1] Petitioners seek to give the impression that the "Dutch Paint Co." had offered "Dutch" paint to the public since 1941 (petition, pp. 6-7, 8, 16), although the Court of Appeals stated:

> "The district court's findings erroneously recite that this Dutch Paint Co. had been producing 'Dutch Paint' since 1941. There is no evidence upon the subject other than that 'Dutch Paint Co.' was listed in the telephone book from 1941 on. When it began producing, or when it made its 'Dutch Paint' labels, does not appear." (223 F. 2d at pp. 198-199, f.n. 2).

In 1947 petitioners began to emphasize the names "Dutch" and "Dutch Paint" (RA. 1888-89, 1894, 656-8, 944, 965, 978)[2] and embarked on an extensive campaign of false and misleading advertising designed to create the impression that their "Dutch" paint was in fact respondent's famous "Dutch Boy" paint sold at a lower price, or was a cheaper line put out by the makers of "Dutch Boy." Although they had never been in business before the war, and had never advertised their paints nationally, their advertisements featured the slogans, "New, Lower Than Pre-War Prices on Dutch Paint (PX 168; DX Z, 1-E, 1-F, 5-W, 5-Z), "Nationally Advertised Dutch Paint" (DX 6-F), and "Quality Famous Dutch Paint" (DX 6-H)—listed as "$6.00 paints" selling at "$2.95," "Half Price," or "50% of the Normal Price" (DX 1-G, 1-H, 1-J, 6-G, 6-H).[3]

These statements were all false as to petitioners' "Dutch" paints, but were clearly applicable to respondent's "Dutch Boy" paints. The prices listed were petitioners' regular prices (RA. 1023), but were about 50% of the price of "Dutch Boy" (RA. 1691, 1731, 1733); the products advertised had no pre-war prices; they were not nationally advertised and were not quality famous. The Court of Appeals properly characterized petitioners' advertising program as "intentionally false and misleading and done with a purpose on their part of deceiving purchasers" (223 F. 2d at 202).

This purpose of deceiving purchasers was fully achieved. The record contains uncontradicted proof of over 290 instances of actual confusion of the trade and the consuming

[2] In using the references "RA." and "RB." we are following the similar references in the petition—namely, to the Record on Appeal No. 13,737 before this Court in the October Term, 1955 (No. 357) and the Record on Appeal No. 16, 157 before this Court on the instant petition, respectively. The symbols "PX" and "DX" are used to denote petitioners' and respondent's exhibits, respectively, in the earlier Record on Appeal.

[3] Many of the fraudulent advertisements appeared subsequent to June, 1949 (see 156 F. Supp. at 889). This conclusively refutes the contention that petitioners were then acting in good faith in reliance upon the advice of counsel (see petition, pp. 15-17, and *infra*, p. 7).

public. These included paint dealers, painters, industrial users and retail customers located in approximately 20 communities in California, as well as in other towns and cities in Washington, Oregon, Idaho, Utah, Wyoming, Nevada and Hawaii (see 223 F. 2d at 201).

The Decisions Below

Petitioners brought a suit for declaratory judgment, seeking vindication of their use of the terms "Dutch" and "Dutch Paint" and, in turn, respondent counterclaimed for infringement and unfair competition. The trial was conducted before Judge ERSKINE, who died before decision and in July, 1951 the record was submitted to Judge MURPHY for decision (RA. 2514-2518). In July, 1952, Judge MURPHY decided the case in petitioners' favor without opinion (RA. 30-31). After adoption of petitioners' proposed findings without change, judgment was entered in January, 1953 for petitioners, declaring that there had been no infringement or unfair competition (RA. 84-86).

The Court of Appeals made an exhaustive and comprehensive review of the facts and the law and unanimously reversed the District Court. It held that the District Court's findings and conclusions were "clearly erroneous" (223 F. 2d at 201, and *passim*).[4]

After discussing the largely uncontradicted evidence, the Court of Appeals held that the petitioners' marks "Dutch," "Dutch Paint" and "Dutch Paint Co." were confusingly similar to "Dutch Boy" in appearance, sound and meaning, and that there was not only a strong likeli-

[4] With respect to the trial court's findings on the issue of confusion, the Court of Appeals stated:

> "Notwithstanding this extensive proof not only of likelihood of confusion but of actual confusion as well, and notwithstanding the evidence was uncontradicated, the trial court found that there were no purchasers who were confused as between defendant's and plaintiffs' products and concluded that there was a lack of similarity because the names differed in sound, significance and appearance. We are unable to perceive how the court could have made such a finding in the light of this record." (223 F. 2d at 201.)

hood of confusion but also, in fact, widespread public confusion (223 F. 2d at 201)..

The Court of Appeals held that the petitioners had been guilty of "false and misleading advertising" and of "a deliberate and intentional design to cause confusion and mistake and to deceive purchasers." Having found intentional infringement, it remanded the case with directions to dismiss petitioners' complaint, to grant respondent an injunction and to proceed to take an accounting of petitioners' profits and respondent's damages (223 F. 2d at 205-206).

The Court of Appeals rejected petitioners' contention that there could be no trademark rights to the word "Dutch" because of its geographical significance, pointing out that both petitioners and respondent were using the word in a fictitious, arbirtary and fanciful manner and not in any geographical or descriptive sense (223 F. 2d at 199, 200). Neither party imports paint from Holland.

Petitioners had also contended that by reason of third party uses of the word "Dutch," either alone or in combination with other words, "Dutch" had become *publici juris*. In holding that there was no merit to this argument, the Court of Appeals said (223 F. 2d at 204):

> "A study of the 39 listed uses of the word 'Dutch' reveals that some of them are duplications, some relate to uses discontinued many years ago, some were used but to a limited extent and in single communities or limited localities far from the Pacific Coast to which appellees' operations were confined, and for the most part in the eastern portion of the United States, and some with respect to which there was no proof of any sale whatever; some relate to non-paint products such as floor wax. The remaining proven third party uses of the word 'Dutch' in connection with paint sale or manufacture are too inconsequential to establish a claim of *publici juris* or the claim that appellant's mark has become a weak mark or to justify on any other theory the acts of these

appellees. It may be that some of these third persons may also have been guilty of wrongful infringement, but such would not be a defense or justification for the appellees. It is no excuse for them to say that others have been guilty of the same wrong. *Del Monte Special Food Co.* v. *California Packing Corp.*, 9 Cir., 34 F. 2d 774; *Potter-Wrightington, Inc.* v. *Ward Baking Co.*, 1 Cir., 298 F. 398, affirming D. C., 288 F. 597."

Following the remand, the parties appeared before the District Court on the accounting proceeding. At the trial on this phase of the case respondent submitted the report of Harold E. Keenan, a retired accountant formerly in its employ, which established that on a sales ratio method (i.e., the ratio of petitioners' sales of "Dutch" paint to total sales applied against petitioners' total profits) the profits accruing to petitioners in the sale of their "Dutch" paint were approximately $402,500 (Pltfs. Ex. 2, Def. Ex. J in the accounting trial). Petitioners' evidence (although largely unsupported and speculative) did indicate that perhaps "Dutch" paint had a higher manufacturing cost than the other types of paint sold by petitioners and that in certain years unusual profits may have been made by petitioners in non-"Dutch" transactions. Accordingly, respondent in the interest of fairness suggested to the District Judge that the Keenan report be modified to take into account these factors. The trial court adopted this suggestion (156 F. Supp. at 888-889) so that the ultimate judgment for profits, with other deductions made by the District Court, came to $178,657.86 (Appendix A to petition, p. 75) instead of approximately $402,500 that would have resulted from a strict application of the sales ratio method.[5]

[5] On page 7 of their petition, petitioners indicate that the total "Dutch" profits were only $109,637.21, but this results from subtracting the losses on "Dutch" paint in certain fiscal years from the profits made in other years. While petitioners had contended that this was the proper method to employ, both the District Court and the Court of Appeals held otherwise, relying upon the well-settled principle that an infringer will not be permitted to set off losses in certain periods against profits made by his infringement in other periods. (156 F. Supp. at 890, 272 F. 2d at 870; see *Duplate Corporation* v. *Triplex Safety Glass Co.*, 298 U. S. 448, 458 [1936]).

The District Court also awarded damages of $60,800, representing legal fees paid by respondent to San Francisco counsel (Appendix A to petition, pp. 74, 75).

The judgment of the District Court was affirmed in all respects by the Court of Appeals (272 F. 2d 867).

One of the contentions advanced by petitioners before the Court of Appeals was that they were not accountable for profits made by them during the period when they were relying in "good faith" upon the advice of counsel. Petitioners also contended that they were not liable for profits made during the period when the judgment of the District Court on the issue of infringement was in effect. In each instance petitioners claimed that they were acting innocently and in good faith. The Court of Appeals summarily disposed of this argument in the following words (272 F. 2d at 871):

> "It [petitioners' conduct] was not innocent, however, in its inception. As has been judicially determined, it was a deliberate and fraudulent appropriation to himself of the good will of appellee. Throughout this period, Wolfe [both petitioners were referred to as 'Wolfe'] had full knowledge of the facts and of appellee's claim of infringement. Whether he believed himself to be within the law or not, he was knowingly and deliberately cashing in upon the good will of appellee. This is such an infringement as will justify an accounting of profits. *Lawrence-Williams Co.* v. *Societe Enfants Gombault et Cie.*, 6 Cir., 1931, 52 F. 2d 774. This course moreover continued after reversal by this Court and until halted by order of the District Court in response to our mandate. One may view with some skepticism the proposition that the conduct of Wolfe from time to time throughout this continuing and constant course of infringement assumed an aspect of innocence wholly free from the original fraudulent intent."

Questions Presented.

We show below in our Argument that the questions set forth in the petition (petition, p. 3) are not the ones presented for review in this Court. In reality, petitioners, for the second time, are seeking further review on the merits in this Court of the issues of fact which were fully considered and determined by the Court of Appeals in its thorough and well-reasoned 1955 opinion.

Argument.

The first question set out in the petition (p. 3) is whether the use of the mark "Dutch Paint" and the tradename "Dutch Paint Company" constitutes infringement of, and unfair competition with, respondent's "Dutch Boy" trademark.

After stating the question, petitioners never again refer to it. Instead, by way of implied confession and avoidance, they argue:

1. That the word "Dutch" (the common feature in both petitioners' and respondent's marks) has been used in a descriptive and geographical sense in the paint industry and thus is "incapable of exclusive appropriation by anyone" (petition, pp. 8, 10, 11-14);

2. That "genuine 'Dutch' paint products" have been imported into this country from the Netherlands since 1902 (petition, p. 9);

3. That the decision below grants respondent "a monopoly over the otherwise unprotectable word *per se*" (petition, p. 9) which respondent "has now extended * * * to the public in general" (petition, p. 19);

4. That the finding of fraudulent conduct cannot stand in view of the fact that petitioners acted on the advice of trademark counsel, whose opinion was con-

firmed by respondent's "counsel" (petition, pp. 14-17); and

5. That the authorities cited by the Court of Appeals in its 1955 opinion do not support the judgment (petition, pp. 21-26).

All of these contentions are either factually untrue, irrelevant, or legally unsound.

By avoiding discussion of the first of the "Questions Presented," petitioners have succeeded only in giving a distorted picture of this case; they have failed to present the real questions sought to be reviewed; and they have simply ignored the findings made by the court below on uncontroverted evidence.

The principal issues below concerned the trademark infringement and unfair competition practiced by the petitioners in their use of the offending marks "Dutch," "Dutch Paint" and "Dutch Paint Co." As to trademark infringement, the questions were:

1. Was respondent's mark "Dutch Boy" a valid trademark?

2. Was petitioners' use of the accused marks likely to confuse the paint purchasing public?

The findings of the court below on both questions were clear and unequivocal. As to the first, the Court of Appeals said (223 F. 2d at 199):

> "The record shows beyond possible controversy that the appellants [respondent] had a trade mark valid both at common law and under the applicable federal acts. Neither the word 'Dutch', nor the words 'Dutch Boy' are used otherwise than in a fictitious, arbitrary and fanciful manner. Of course the word 'Dutch' is capable of being used as a geographical term. If used to indicate a product made in Holland or by some Dutch process, it could be a descriptive term. However, the record shows with-

> out doubt that appellant's trade mark does not contain words having either a geographical or descriptive sense. In this respect the case is governed by *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 36 S. Ct. 269, 271, 60 L. Ed. 629, where the court said: 'We do not regard the words "The American Girl," adopted and employed by complainant in connection with shoes of its manufacture, as being a geographical or descriptive term. It does not signify that the shoes are manufactured in America, or intended to be sold or used in America, nor does it indicate the quality or characteristics of the shoes. Indeed, it does not, in its primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected by complainant's predecessors to designate shoes of their manufacture. We are convinced that it was subject to appropriation for that purpose, and it abundantly appears to have been appropriated and used by complainant and those under whom it claims. * * * "The American Girl" would be as descriptive of almost any article of manufacture as of shoes; that is to say, not descriptive at all.' "

The findings were equally clear on the second question. The Court of Appeals found that respondent's trademark and the marks used by petitioners were confusingly similar in appearance, sound and meaning, when considered by themselves,[6] and that, in addition, the uncontradicted evidence showed "some 290 instances in which paint dealers, painters, industrial users of paints and retail customers

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[6] The finding of confusing similarity of "Dutch" and "Dutch Boy" is supported by an overwhelming body of authority. See, e.g., *Brooks Bros.* v. *Brooks Clothing of California*, 158 F. 2d 798 (9th Cir. 1947), aff'g 69 F. Supp. 442 (S. D. Cal. 1945), cert. denied 331 U. S. 824 ("Brooks Brothers" infringed by "Brooks"); *Thomas G. Plant Co.* v. *May Co.*, 105 Fed. 375 (6th Cir. 1900; "Queen Quality" infringed by "Queen"); *Century Distilling Co.* v. *Continentental Distilling Co.*, 106 F. 2d 486 (3rd Cir. 1939; "Dixie Belle" infringed by "Dixiana"); *United Drug Co.* v. *Obear-Nester Glass Co.*, 111 F. 2d 997 (8th Cir. 1940; "Rex" infringed by "Rexall"); *American Viscose Corp.* v. *Crown Craft, Inc.*, 28 F. Supp. 884 (S. D. N. Y. 1939; "Crown" infringed by "Crown Craft"); *Industrial Rayon Corp.* v. *Dutchess Underwear Corp.*, 92 F. 2d 33 (2nd Cir. 1937), cert. denied 303 U. S. 640 ("Spun-lo" infringed by "Sunglo").

were actually deceived or misled by the appellees' [petitioners'] use of 'Dutch,' 'Dutch Paint,' 'Dutch Paint Company', and by their advertisements, into believing that appellees' paints were actually the appellant's [respondent's] Dutch Boy paints" (223 F. 2d at 201).

On the issue of unfair competition, the Court of Appeals said (223 F. 2d at 205):

> "What we have said heretofore has in terms referred to the trade-mark infringement. That, however, is but one aspect of the larger field of unfair competition. It requires no extended discussion in view of what we have said to demonstrate that the acts here complained of are not only an infringement of trade-mark but they constitute acts of unfair competition.
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> * * * * *
>
> "In order to make out a case of unfair competition, it is only required that the natural and necessary consequence of appellees' conduct in this respect was such as to cause deception. The case of *Ross-Whitney Corp.* v. *Smith Kline & French Lab.*, 9 Cir., 207 F. 2d 190, sufficiently demonstrates that wholly apart from trade-mark infringement, the appellant had here made out a case of unfair competition and that the court below had jurisdiction thereof."

The Court then concluded that in view of petitioners' "deliberate and intentional design to cause confusion and mistake and to deceive purchasers, the conclusion must be that whether the cause be viewed as one of unfair competition or as one of infringement of a registered trade-mark, appellant [respondent] is entitled not merely to relief by injunction but to an accounting of profits and damages as well" (ibid.).

We now turn to the specific arguments presented in the petition.

1. Petitioners' first contention outlined above is based upon an obvious distortion of the findings made by the

Court of Appeals. Petitioners admittedly did not use "Dutch" either descriptively or geographically (RA. 2292-2293). Their paints were manufactured in the United States; they were not imported from Holland. Furthermore, the Court of Appeals expressly held that respondent used the word "Dutch" in a fictitious, arbitrary and fanciful manner (223 F. 2d at 199). It emphasized that its decision would have no effect upon the use of "Dutch" in its proper sense:

> ". . . no one questions the possibility of using the word 'Dutch' in a geographical or descriptive sense." (223 F. 2d at 204).

The Court of Appeals made it abundantly clear that petitioners had not brought themselves within the privilege of a truthful use of "Dutch":

> "The fact that 'Dutch' as a dictionary term has a geographical significance and that it would be possible for a manufacturer to use that word in connection with his business in its primary geographical sense is beside the point here. Thus one who manufactures paint in Holland cannot be restrained from selling his product as 'Dutch' paint any more than a watch manufacturer in Switzerland can be prevented from selling his 'Swiss' watches. No use of the word 'Dutch' in a geographical sense is involved here. . . .
>
> . . . . . .
>
> As the appellees [petitioners] are not making their paints in Holland or using any Dutch processes or giving them any distinctive Dutch quality, the fact that others might have done so is of no significance in this case." (223 F. 2d at 200.)

In short, the fact that others may use "Dutch" truthfully in a non-confusing manner does not give petitioners a license to deceive the public.

2. Petitioners' second point (that paints produced in the Netherlands have been imported into this country since 1902) is wholly irrelevant. As noted above, the Court of

Appeals expressly held that "one who manufactures paint in Holland cannot be restrained from selling his product as 'Dutch' paint" (223 F. 2d at 200). Thus, it is clear, the decision would not affect the right of genuine Dutch manufacturers from selling "Dutch" paint in this country.

3. What we have said above in answer to petitioners' first argument applies with equal force to their third contention. It is obvious that the Court of Appeals did not grant respondent a "monopoly" in the word "Dutch." Nor is there any support in the record for the assertion that respondent "has now extended this monopoly to the public in general" (petition, p. 19). The fact that approximately fifteen users of the word "Dutch" in the paint field have agreed, without litigation, to discontinue use of that term certainly cannot justify petitioners' fraudulent infringement and unfair competition. Nor, does it establish that respondent has a "monopoly" of "Dutch." Nothing in the decision of the Court of Appeals forbids the truthful, non-confusing use of the term "Dutch" by anyone.[7]

4. In their next argument (denominated "3", see petition, pp. 14-17) petitioners apparently take issue with the findings below of deliberate and intentional infringement. They also assert that the judgment awarded on the accounting represents a "windfall" for respondent and deprives them of their property "without due process of law" (petition, p. 14).[8]

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[7] For this reason, the cases cited on page 20 of the petition are wholly inapplicable.

[8] Petitioners complain of the size of the judgment awarded below ($178,657.86 in "Dutch" profits, plus attorneys' fees of $60,800) and state that only the very wealthy could face such a judgment without bankruptcy (petition, p. 14). Aside from the fact that the judgment for profits was reduced, partly at the suggestion of respondent (see 156 F. Supp. at 888-889), from a potential liability of approximately $402,500 to the sum indicated, it should be noted that petitioners' own exhibit (Pltfs. Ex. 2 in the accounting proceeding) shows that over the ten year period from 1946 to 1956 petitioners' "Total Sales" were more than $4,000,000 and their "Net Profit from Operations" totalled approximately $627,000. The record also establishes that the net income of petitioners' paint business from January 1, 1946 to April 30, 1950 was in excess of $392,000 (RB. 425).

First, petitioners claim that the paint business which they acquired in 1946 was "a going concern which had used the trade name 'Dutch Paint Co.' continuously since August, 1941" (petition, p. 15). We have already shown (p. 2, footnote 1) that the Court of Appeals found that the record contained no proof as to when this concern began producing "Dutch" paint or as to when it made its "Dutch Paint" labels. The record does establish, however, that petitioners in 1946 paid only some $9,000 for the small paint factory known as "Dutch Paint Co." (see 223 F. 2d at 198) and that this company then had only a few customers (from 12 to 35, according to the testimony of petitioner Wolfe, see RA. 628-629).

Petitioners next assert that the advice given them in the spring of 1948 by a San Francisco attorney concerning their right to use the "Dutch" label absolves them from any findings of fraudulent conduct (petition, pp. 15, 16). On the second appeal this claim was summarily rejected by the Court of Appeals (see p. 7, above).

In any event, however, petitioners cannot successfully contend that this advice gave them carte blanche to engage in an extensive fraudulent advertising campaign, much of which occurred after June, 1949 (see 156 F. Supp. at 889), to hoodwink the paint purchasing public into the belief that their "Dutch" paint was the "Famous Quality" paint known as "Dutch Boy," or otherwise to use their mark in an effort to poach upon the "commercial magnetism" of respondent's well known trademark (cf. *Mishawaka Mfg. Co.* v. *Kresge Co.*, 316 U. S. 203, 205 [1942]).

The issue of petitioners' fraudulent conduct was succinctly summarized by the Court of Appeals in the following language (223 F. 2d at 205-206):

> "As for appellant's rights under the trade-mark acts, since this is not a case where there has been 'no showing of fraud or palming off', cf. *Champion*

> *Spark Plug Co.* v. *Sanders*, 331 U. S. 125, 131 67 S. Ct. 1136, 1139, 91 L. Ed. 1386, but where the showing is quite to the contrary and the intentional misleading has been demonstrated, appellant is entitled not merely to an injunction as prayed for but to an accounting of appellees' profits and a recovery of any damages sustained under the provisions of Title 15 U.S.C.A. § 1117, pursuant to the rule of *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.*, 316 U. S. 203, 62 S. Ct., 1022, 86 L. Ed. 1381."

Petitioners quote (petition, p. 15) from an inter-office memorandum of respondent (which they never saw until after this action was begun) and assert that this "confirmed" the opinion of their own counsel. They also claim that the person writing this memorandum was respondent's "attorney" or "counsel" (see Question 2[c], petition, p. 3, and petition, p. 16, last line). Petitioners make these astounding assertions despite the fact that the Court of Appeals expressly stated (223 F. 2d at 203):

> "The writer of the letter was not a lawyer; the letter was an intra-company communication, never addressed to anyone outside the appellant company [respondent], and there was no reliance upon it by appellees [petitioners]. Cf. *Aunt Jemima Mills Co.* v. *Rigney & Co.*, 2 Cir., 247 F. 407."

Petitioners assert that under all of these circumstances it would be a strange rule of reason to subject a party to a quarter of a million dollar judgment (petition, p. 16).[2] The simple answer to this is that in view of their deliberate and wholesale fraud, petitioners should consider themselves fortunate that the judgment was not larger.

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[2] Petitioners imply that the judgment below gave them no salary for their own efforts in making sales (petition, p. 16). Actually, on the accounting the District Judge allowed each of the petitioners a corporate salary of $1,000 per month as a deduction from "Dutch" profits (see 156 F. Supp. at 892).

5. Petitioners contend that the authorities relied upon by the Court of Appeals do not support its judgment (petition, pp. 21-26). Nothing could be further from the mark. The precedents were analyzed in our brief in opposition to the 1955 petition for certiorari (No. 357, October Term, 1955) and need not be repeated here.

The Court of Appeals, in 1955, reviewed the facts and the law as was its function under the Rules and settled case authority, and upon determining that the findings and conclusions of the District Court were "clearly erroneous," it properly reversed the judgment below.[10]

Conclusion.

The Court of Appeals in 1955 correctly found petitioners guilty of fraudulent infringement and unfair competition. Its decision is fully supported by the authorities and the Court of Appeals properly served the public policy by enjoining the continuation of petitioners' deliberate scheme to confuse and mislead the public. The decision of the Court of Appeals in 1959, affirming the judgment for profits and damages, is similarly fully supported by the authorities.

There is thus no conflict between either decision below and any decision of this Court or of any Court of Appeals. On the contrary, there is no important question of Federal

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[10] See Rule 52(a), Federal Rules of Civil Procedure. Since the District Judge decided the case solely on the written record and did not hear or see the witnesses, the scope of review by the Court of Appeals was even broader than in the ordinary case. See, e.g., *Smyth* v. *Barneson*, 181 F. 2d 143, 144 (9th Cir. 1950); *Equitable Life Assurance Society* v. *Irelan*, 123 F. 2d 462, 464 (9th Cir. 1941); *Orvis* v. *Higgins*, 180 F. 2d 537, 539 (2nd Cir. 1950); *Jonah* v. *Armstrong*, 52 F. 2d 343, 345 (10th Cir. 1931); *Hopkins* v. *Texas Co.*, 62 F. 2d 691 (10th Cir. 1933), cert. denied 290 U. S. 629; *Federal Deposit Ins. Corp.* v. *Siraco*, 174 F. 2d 360, 363 (2nd Cir. 1949); *F. W. Stock & Sons, Inc.* v. *Thompson*, 194 F. 2d 493, 495-496 (6th Cir. 1952). In the Court of Appeals petitioners did not dispute the broad review permitted to that Court under these authorities, and merely urged that the findings and conclusions of the District Court were correct.

law involved which has not already been settled by this Court.

Accordingly, respondent respectfully urges that the petition be denied.

March 23, 1960

Respectfully submitted,

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